

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on July 5, 2012 appellant, then a 52-year-old transportation security officer, sustained lumbar radiculopathy and an aggravation of a preexisting lumbar disc herniation while handling luggage and screening trays.² He stopped work on July 6, 2012 and did not return. Appellant claimed wage-loss compensation from July 9, 2012 and continuing.³ The employing establishment separated appellant effective January 11, 2013 and OWCP placed him on the periodic rolls effective January 12, 2013.

On May 2, 2014 the record reflects that appellant elected to continue postretirement basic life insurance (PRBLI) as a compensation and elected to receive PRBLI at the “No Reduction” option.

In a July 31, 2014 memorandum, OWCP advised appellant that, according to the Office of Personnel Management (OPM), appellant’s PRBLI coverage began on January 12, 2013.

On August 28, 2014 OWCP informed appellant that, as it had not deducted PRBLI premiums from appellant’s compensation for the period January 12, 2013 through July 26, 2014, an overpayment of compensation in the amount of \$1,759.38 had been created.

By notice dated August 28, 2014, OWCP advised appellant of its preliminary determination of an overpayment of compensation in the amount of \$1,759.38 because PRBLI premiums had not been deducted from his compensation payments for the period January 12, 2013 through July 26, 2014. It provided a calculation of the overpayment, noting that he was not at fault in its creation. OWCP requested that appellant provide financial information within 30 days and was provided an opportunity for a telephone conference, a precoupment hearing, or a decision based on the written record.

By form dated September 7, 2014 appellant requested that OWCP make a decision based on the written record and requested waiver, contending that the overpayment had occurred through no fault of his own. Included with the form, was a signed overpayment recovery questionnaire (Form OWCP-20). This package was received by OWCP on September 18, 2014.⁴

² On July 16, 2012 appellant claimed a recurrence of total disability commencing July 6, 2012. He also filed a claim for a July 6, 2012 traumatic lip and left leg injury when he was struck by a tray on a conveyor belt.

³ OWCP had originally denied the July 5, 2012 injury claim by decision dated August 30, 2012. Following a review of the written record, by decision dated December 12, 2012, a hearing representative affirmed the denial of the claim as causal relationship had not been established. OWCP later accepted the claim.

⁴ Appellant listed assets of \$20.00 cash, \$20.00 in a checking account, and \$5.00 in a savings account. He noted income of \$1,985.00 a month in compensation. Appellant listed monthly expenses totaling \$5,792.73: \$1,500.00 for rent; \$600.00 in food for himself and his wife; \$200.00 for clothing; \$1,028.74 in utilities; and \$1,863.99 in miscellaneous expenses. He noted debt repayment of \$100.00 a month to the Internal Revenue Service and \$500.00 a month to his attorney. Appellant submitted utility bills and debt repayment statements corroborating the amounts listed. In a September 6, 2014 letter, he advised OWCP of a July 30, 2014 \$9,090.00 civil judgment against him for rent arrearages. Appellant requested that OWCP not garnish his compensation payments to satisfy the judgment or he would be evicted and homeless. He provided a copy of the judgment.

By decision dated January 12, 2015, OWCP finalized that appellant had received an overpayment of compensation in the amount of \$1,759.38 for the period January 12, 2013 through July 26, 2014 as no PRBLI premiums had been deducted from his compensation payments. It found that he was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver because no response had been received to the preliminary decision. OWCP directed recovery by deducting \$135.00 every 28 days from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees Group Life Insurance (FEGLI) program, most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.⁵ The coverage for basic life insurance is effective unless waived,⁶ and premiums for basic and optional life coverage are withheld from the employee's pay.⁷ Upon retirement or upon separation from the employing establishment or being placed on the periodic FECA compensation rolls, an employee may choose to continue basic and optional life insurance coverage, in which case the schedule of deductions made will be used to withhold premiums from his or her annuity or compensation payments.⁸ Basic insurance coverage shall be continued without cost to an employee who retired or began receiving compensation on or before December 31, 1989;⁹ however, the employee is responsible for payment of premiums for optional life insurance coverage which is accomplished by authorizing withholdings from his compensation.¹⁰

A 1980 amendment of 5 U.S.C. § 8706(b)(2) provided that an employee receiving compensation under FECA could elect continuous withholdings from his compensation, so that his life insurance coverage could be continued without reduction. 5 C.F.R. § 870.701 (December 5, 1980) provided that an eligible employee had the option of choosing no life insurance; Option A -- basic coverage (at no additional cost) subject to continuous withholdings from compensation payments that would be reduced by 2 percent a month after age 65 with a maximum reduction of 75 percent; Option B -- basic coverage (at an additional premium) subject to continuous withholdings from compensation payments that would be reduced by 1 percent a month after age 65 with a maximum reduction of 50 percent; or Option C -- basic coverage

⁵ 5 U.S.C. § 8702(a).

⁶ *Id.* at § 8702(b).

⁷ *Id.* at § 8707.

⁸ *Id.* at § 8706.

⁹ *Id.* at § 8707(b)(2).

¹⁰ *Id.* at § 8706(b)(3)(B). See *Edward J. Shea*, 43 ECAB 1022 (1992) (the Board found that claimant received an overpayment of compensation where he elected postretirement basic life insurance with no reduction and no premiums had been deducted from his compensation from January 3, 1988 to May 6, 1989). See also *Glen B. Cox*, 42 ECAB 703 (1991) (the Board found that an overpayment was created due to no deduction of premiums for optional life insurance for periods from July 1983 through November 1989).

subject to continuous withholdings from compensation payments with no reductions after age 65 (at a greater premium).¹¹

Each employee must elect or waive Option A, Option B, and Option C coverage, in a manner designated by OPM, within 60 days after becoming eligible unless, during earlier employment, he or she filed an election or waiver that remains in effect.¹² Any employee who does not file a Life Insurance Election with his or her employing office, in a manner designated by OPM, specifically electing any type of optional insurance, is considered to have waived it and does not have that type of optional insurance.¹³ When an under-withholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation because OWCP must pay the full premium to the OPM upon discovery of the error.¹⁴

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹⁵ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.¹⁶

ANALYSIS -- ISSUE 1

The employing establishment separated appellant effective January 11, 2013 and appellant was placed on the period rolls effective January 12, 2013. The record establishes that appellant elected to receive PRBLI at the “No Reduction” option. Further, OPM notified OWCP that coverage for PRBLI became effective on January 12, 2013 and advised OWCP that the premiums should be calculated on an annual salary of \$39,619.00. OWCP determined that these premiums had not been deducted from appellant’s compensation payment from January 12, 2013 to July 26, 2014 resulting in an overpayment of \$1,759.38.

As OWCP had failed to deduct any PRBLI premiums for the period, appellant was overpaid in compensation benefits in the amount of \$1,759.38. The Board finds that OWCP properly determined the fact and the amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs because of an error of fact of law, adjustment or recovery shall be made by decreasing later

¹¹ See *James J. Conway*, Docket No. 04-2047 (issued May 20, 2005).

¹² 5 C.F.R. § 870.504(a)(1)

¹³ *Id.* at § 504(b).

¹⁴ 5 U.S.C. § 8707(d); see also *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

¹⁵ *Id.* at § 8102(a).

¹⁶ *Id.* at § 8129(a).

payment to which the individual is entitled.¹⁷ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b).

Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.

Thus, a finding that appellant was without fault is insufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience, pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations¹⁸ provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual.¹⁹ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).²⁰

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²¹ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.²² The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.²³

¹⁷ 5 U.S.C. § 8129(a).

¹⁸ 20 C.F.R. § 10.436.

¹⁹ *Id.* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

²⁰ *Id.*

²¹ *Id.* at § 10.437(b).

²² Federal (FECA) Procedure Manual, *see supra* note 19 at Chapter 6.200.6.b(3) (October 2004). *C.P.*, Docket No. 14-975 (issued September 11, 2014).

²³ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation and considered whether he was entitled to waiver of recovery. Waiver is only possible if recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP's procedures.²⁴

In its January 12, 2015 decision, OWCP found that appellant had failed to respond to the preliminary notice of overpayment. However, appellant had submitted substantial information regarding his income, assets, and expenses. He had provided an overpayment recovery questionnaire with supporting documentation, showing \$1,500.00 in rent, \$600.00 for food, \$200.00 for clothing, \$1,028.74 in utilities, and \$600.00 in debt repayment, although the terms of the repayment were not entirely clear. Appellant also submitted a July 30, 2014 civil judgment for \$9,090.00 for back rent.

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.²⁵ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before OWCP at the time of its final decision,²⁶ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,²⁷ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.²⁸

In the present case, OWCP clearly did not review relevant evidence received prior to the issuance of its January 12, 2015 decision, *i.e.*, the waiver request and the financial information submitted by appellant. The Board, therefore, must set aside the Office's January 12, 2015 decision with respect to the issues of waiver and recovery of the overpayment and remand the case so that OWCP may fully consider the evidence that was properly submitted by appellant prior to the issuance of this decision, as well as apply the standards for determining entitlement to waiver. Following such further consideration and after such further development as it deems necessary, OWCP shall issue a *de novo* decision.

²⁴ *Id.* at § 10.436.

²⁵ *Supra* note 1 at § 8124(a)(2); *Id.* at § 10.130.

²⁶ *See* 20 C.F.R. § 501.2(c).

²⁷ *Id.* at § 501.6(c).

²⁸ *William A. Couch*, 41 ECAB 548, 553 (1990).

The decision of whether OWCP shall waive recovery of an overpayment is a matter that rests in its discretion to be exercised pursuant to regulatory guidelines. The Board will not substitute its own discretion to decide the matter.²⁹

The case will be remanded to OWCP for further clarification, including the provision of additional detailed findings, regarding the issue of waiver of recovery of the \$1,759.38 overpayment. If appropriate, OWCP should request updated financial information from appellant. After such development as it deems necessary, it shall issue an appropriate decision in the case.

On appeal appellant requests waiver of recovery due to financial hardship, emphasizing that he was not at fault. As stated above, the case is not in posture on the issue of waiver, as OWCP had not fully considered the financial evidence submitted. Appellant also contends that OWCP erred in finding that he failed to respond to the preliminary notice of overpayment, as he had submitted the overpayment recovery questionnaire and supporting documentation as requested. The case will be remanded to OWCP for full consideration of his financial information.³⁰

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation in the amount of a \$1,759.38 for the period January 12, 2013 through July 26, 2014, for which he was not at fault. The Board further finds that the case is not in posture for a decision regarding appellant's entitlement to waiver of recovery of the overpayment.

²⁹ See *John M. Dunn*, Docket No. 92-2096 (issued February 18, 1994).

³⁰ As the case is not in posture for a decision on the issue of waiver, it is premature for the Board to address the rate of recovery under Issue 3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 12, 2015 is affirmed, in part, regarding the fact and amount of the overpayment, and remanded in part for additional development regarding waiver and recovery in accordance with this decision and order.

Issued: July 6, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board